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THE PRUSSIAN-AMERICAN TREATIES

I

FEW international agreements have received the praise accorded to the treaty entered into between the United States and Prussia in 1785. It was acclaimed at the time as setting a new standard of international conduct, realizing to the fullest extent the humanitarian aspirations of the eighteenth century. To Benjamin Franklin and Frederick the Great have been awarded the credit for this epoch-making document. Franklin's treaty, partly renewed in 1799, was again renewed in part in 1828. After the formation of the German Empire, the treaty of 1828 continued to be recognized as binding, and its provisions continued to serve for the adjustment of commercial relations between Germany and the United States without serious question until the outbreak of the present great European War.

After the Empire was established, the German Foreign Office undertook a systematic negotiation of commercial treaties with the various countries of the world. The old Prussian treaty, however, was considered, by both Germany and the United States, as sufficient for general purposes, and no general commercial treaty was negotiated between the two countries, international agreements between them being limited to the various conventions of narrower scope. The result was that the United States, confronted as a neutral in the world war with vast duties and responsibilities, found itself bound by an obligation, the principal part of which had been negotiated a century and a quarter before the war began. Never before had this treaty been subjected to any serious strain. The portions of the treaty first adopted in 1785 and then renewed in 1799 and in 1828 had received few interpretations. Between 1828 and 1914 the provisions of the treaty never became the subject of dispute between the United States and Prussia or the Empire.

While all works upon the history of American diplomacy have devoted considerable space to the negotiation of the original treaty

of 1785, no attempt, it is believed, has been made to fit the successive agreements into the general scheme of the foreign policy of the United States at the time of the various negotiations. It is proposed in the present article to re-examine the negotiations, to attempt to estimate the influences which produced the original treaty and the modifications of it made in 1799 and 1828, and to trace to their sources the unusual provisions of the treaty of 1785, so long praised as the realization of the ideal in international relations, but recognized since the present war began as provisions giving rise to very serious questions of construction and interpretation.

The authorship of the treaty of 1785 has usually been ascribed to Benjamin Franklin. The effect of the influence of Frederick the Great upon its provisions has been considered, and the general conclusion has been that Frederick adopted for the most part the propositions made by Franklin and his fellow commissioners without much modification, for the reason that the likelihood of either close relationship or serious disagreement between Prussia and the new-born republic of the new world was remote. In order to secure a market for Silesian linens and other products of Prussia, Frederick was willing to agree to practically anything which the American commissioners might suggest. The tradition that Frederick the Great was a friend to the cause of America was demolished some years since by Dr. Paul L. Haworth in an essay entitled "Frederick the Great and the American Revolution."[1] The most detailed account of the German side of the negotiations appeared in a monograph by Dr. Friedrich Kapp entitled *Friedrich der Grosse und die Vereinigten Staaten*, based to a considerable extent upon unpublished materials in the Prussian archives.[2]

Tracing the lineage of the Prussian treaty of 1828, we go back to that of 1799, from that to 1785. With the exception of the treaty of 1787 with Morocco, the treaty with Prussia was the last of the group of commercial treaties negotiated during the period of the Confederation. It followed the treaty of 1783 with Sweden, which was based upon that with the Netherlands of 1782, and this in turn drew in part upon the treaty of amity and commerce with France of February 6, 1778.

[1] American Historical Review, IX, 460–478. [2] Leipzig, 1871.

The French treaty is principally derived from the draft plan of the treaties submitted to the Continental Congress July 18, 1776. This draft plan is the starting point of American commercial treaties, and it has been noted that not only many of the provisions, but much of the phraseology of the draft plan of 1776, are reproduced in the treaties during the Confederation and also in those negotiated after the Constitution was adopted. On June 12, 1776, the Continental Congress selected a committee to prepare a plan of treaties to be proposed to foreign Powers. The committee consisted of John Dickinson, Benjamin Franklin, John Adams, Benjamin Harrison, and Robert Morris.[3] Of the drafting committee, only Franklin and Adams afterwards signed treaties for the United States. Franklin signed those with France, 1778, and Sweden, 1783. Adams was one of the signers of the treaty with the Netherlands in 1782, and both Adams and Franklin signed the Prussian treaty of 1785. The committee considered the form of the draft between June 12 and July 18, 1776,[4] when the plan was submitted in full to the Continental Congress. The extent to which the various members of the committee contributed to the formulation of the draft cannot be determined. Doubtless Franklin had much to do with it, but the original draft of the report is wholly in the writing of John Adams. The plan as finally amended was incorporated in the instructions of the Continental Congress dated September 24, 1776.[5] These instructions were prepared by James Wilson, who incorporated the amendments made to the plan by the Continental Congress. The question at once arises whence Adams and his associates derived the provisions of their plan of treaties. Adams's manuscript makes reference to the "collection of state tracts" and the "collection of sea laws," and these collections were doubtless made use of in preparing the draft. The exact editions, however, which were used have not been determined; but it is not difficult to indicate the sources from which the plan was derived. The treaties of Utrecht of 1713 commemorated the close of one commercial era and the opening of another. In particular, the treaties between France and England of March 31 and April 11,[6] and that between France and the United Provinces of the same date [7]

[3] Journals of the Continental Congress, Ford edition, V, 433.
[4] *Ibid.*, 576. [5] *Ibid.*, 813. [6] Dumont, Vol. 8, Part I, p. 345. [7] *Ibid.*, p. 377.

contained many of the provisions of Adams's draft. Several articles of the draft are of especial significance. Article 19 was as follows:

> It shall be lawfull for the Ships of War of either Party and Privateers, freely to carry whither so ever they please, the Ships and Goods, taken from their Enemies, without being obliged to pay any Duty to the Officers of the Admiralty or any other Judges; nor shall such Prizes be arrested, or seized, when they come to, and enter the Ports of either Party; nor shall the Searchers, or other Officers of those Places search the same, or make Examination concerning the Lawfullness of such Prizes, but they may hoist sail, at any Time and depart and carry their Prizes to the Place expressed in their Commissions, which the Commanders of such Ships of War shall be obliged to shew: on the Contrary, no Shelter, or Refuge shall be given in their Ports to such as shall have made Prize of the Subjects, People, or Property, of either of the Parties; but if such should come in, being forced by Stress of Weather, or the Danger of the Sea, all proper Means shall be vigorously used, that they go out, and retire from thence as soon as possible.

This sets forth in English the text of the twenty-sixth article of the Franco-British treaty of 1713. Article 27 of the draft includes a restricted list of contraband identical with that of Article 19 of the Franco-British treaty; and the list of merchandise never to be reckoned among contraband or prohibited goods which immediately follows in the draft is taken verbatim from Article 20 of the same treaty. Article 23 of the draft is as follows:

> For the better promoting of Commerce on both Sides, it is agreed, that if a War should break out between the Said two Nations, Six Months, after the Proclamation of War, shall be allowed to the Merchants, in the Cities and Towns where they live, for selling and transporting their Goods and Merchandizes; and if any Thing be taken from them, or any Injury be done them within that Term by either Party, or the People or Subjects of either, full Satisfaction shall be made for the Same.

This is derived without substantial change from Article 2 of the same treaty. Article 26 of the draft provides that free ships make free goods; while, on the other hand, that enemy ships make enemy goods was recognized by Article 16 of the draft. Both provisions were taken from the Franco-British treaty.

Enough has been said to warrant the conclusion that the doctrines of free ships, free goods; enemy ships, enemy goods; limited contra-

band list, and asylum for prizes appearing in the draft were derived from the corresponding provisions of the treaties of Utrecht; and these provisions, in addition to the more usual ones of the most favored nation clauses and the right to navigation and residence, the abolition of the *droit d'aubaine*, give us the main features of nearly all of the commercial treaties entered into between the United States and European countries during the period of the Confederation. The draft of July, 1776, was followed to a surprising degree in the French treaty of 1778. The provision with reference to asylum for prizes which appears in the French treaty was significantly placed, not in the treaty of alliance, but as Article 17 of the commercial treaty of 1778. The treaty with the Netherlands follows the French treaty or the draft as a common source with a few important exceptions. The provisions as to free ships, free goods, enemy ships, enemy goods, and asylum for prizes were repeated. The contraband article did not particularize as to the list of goods which could not be made contraband of war. The period of six months given to the nationals of the contracting parties for the purpose of quitting the country in case of war was increased from six to nine months, and in this respect followed the provisions of Article 41 of the Franco-Dutch treaty of Utrecht.[8]

The Swedish treaty of 1783 again follows very closely the provisions of the commercial treaties, even to the provision for asylum for prizes; and this treaty, negotiated by Franklin, was used as the basis of the negotiations with Prussia which were begun by John Adams.

II

THE NEGOTIATION OF THE TREATY OF 1785

The negotiation of a commercial treaty with the Netherlands, begun by John Adams, April 23, 1782, dragged along until October 8 of that year, when the treaty was signed. At Paris, meanwhile, overtures for a commercial treaty were made to Franklin by the Swedish ambassador. Writing to Livingston August 12, 1782, Franklin said, "I understand from the Swedish ambassador that their Treaty with us will go on as soon as ours with Holland is finished; our Treaty with

[8] Dumont, VIII, 1, 381.

France, with such improvements as that with Holland may suggest, being included as the basis." [9] Before the Netherlands treaty was signed, Franklin received his commission to negotiate a treaty with Sweden "having for its basis the most perfect equality, and for its object the mutual advantage of the parties." [10] The following April the treaty was signed by Franklin at Paris. The original instructions from the Continental Congress had not been materially changed since 1776, and the terms of Franklin's treaty departed little from those which Adams had agreed to at the Hague. "It differs very little from the plan sent me, in nothing materially." As this treaty was taken by Adams and Thulemeier, the Prussian minister at The Hague, as the basis for the Prussian treaty, the draft of Adams of 1776, the French commercial treaty of 1778, the Netherlands treaty of 1782, and that with Sweden of 1783 became linked together into one consistent body of principles.

To the extent to which these earlier treaties negotiated by the United States contained provisions which were carried into that with Prussia, we have but a continuation of a foreign commercial policy which antedates the Declaration of Independence. This policy, as expressed in Adams's draft of 1776 and in the French, Dutch, and Swedish treaties, was one based upon several considerations. It represented in the main the position of the continental European Powers, which had been opposed at times or continuously to the sea-power of Great Britain. Of these continental Powers France was the most conspicuous and powerful. Adams's draft incorporated the principles and practices of the opposition to British sea-power as they had been developed during the latter half of the seventeenth and all of the eighteenth century. These were advocated by most of the continental text-writers of the eighteenth century, who, influenced by the spirit of "enlightenment," strove for the recognition, not only of the so-called fundamental rights of states, but also of the newer rights of neutrals, all of them bulwarks of protection against brute force, whether exercised on land or sea. Of these, Vattel was the text-writer most in fashion, but it was Hübner, in his work on the capture of neutral vessels,

[9] Sparks, Dip. Corr. Rev., II, 389, quoted by Davis, Notes, 1398.
[10] Sept. 28, 1782, Dip. Corr. (Confed.), I, 34.

who gave fullest recognition to neutral claims.[11] Still later Galiani and Lampredi argued for neutral rights in doctrines which had found expression in the legislation of several Italian states some years before the famous neutrality proclamation of 1793.[12]

Adams's draft and the treaties based on it were, therefore, in harmony with continental theory and practice and opposed to the English prize-rules. In them all were the doctrines of (*a*) free ships, free goods; (*b*) its complement, enemy ships, enemy goods (especially valuable as against England); (*c*) the contraband list limited to war munitions and supplies; (*d*) the regulation of visitation and search by providing for approach; (*e*) the regulation of privateering by the requirement of bonds against unlawful seizures and unnecessary injury; (*f*) asylum for prizes; (*g*) nationals of one country to be considered as pirates who accepted letters of marque from the enemies of the other country. These were the leading provisions which protected the rights of neutrals. In time of peace nationals of the contracting parties were to be accorded either equality of treatment in their respective territories or treatment upon a most favored nation basis. In time of war a definite period was to be given for enemy aliens to arrange their affairs and depart freely. Summing up all these, we may say that the policy of the United States from the first was for freedom of intercourse in time of peace, as opposed to the older principles of mercantilism, for the rights of neutrals as against the claims of force, and for the preservation of personal and property rights on land, even in time of war. Until the Prussian treaty was signed, no commercial treaty entered into by the United States contained a single novelty. All of their provisions represented enlightened practice, most of them in harmony with the general maritime principles adopted by France, and in opposition to those of England. Adams's treaty with the Netherlands and Franklin's with Sweden continued in line with this general policy.

During the summer of 1783, following the signature of the Swedish treaty, Adams and Franklin received proposals for commercial trea-

[11] Hübner, *De la Saisie des Bâtimens Neutres*, 1759. The edition usually cited is that of London, 1778.

[12] De Martens, *Recueil*, III, 24–87. Tuscany, Aug. 1, 1778, followed by the v c Sicilies, Sept. 19, 1778, the Pope, March 4, 1779, and Genoa, July 1, 1779.

ties from Denmark, Portugal, Austria, Prussia, Tuscany, and Spain. Congress resolved that "the Minister of the United States be instructed to encourage overtures for treaties of amity and commerce from the respectable and commercial Powers of Europe, upon terms of the most perfect reciprocity, and subject to the revisal of Congress prior to their ratification." [13] Instructions in line with this resolution were adopted October 29, 1783. Special provisions were included for the negotiations with the Empire (Austria), Denmark, and Great Britain; but as to the other commercial Powers, no new instructions were formulated beyond the caution that the new treaties should not conflict with the previous obligations of the United States, that their terms should be for not more than fifteen years, and that they should be binding only when ratified by the Congress.[14]

The overtures to Franklin on the part of the Prussian minister at Paris did not directly propose a treaty. Writing to Livingston, July 22, 1782, Franklin said, "[He] has given me a Pacquet of lists of the several sorts of merchandise they can furnish us with, which he requests me to send to America for the information of our merchants." [15] No further steps were taken by Franklin, and the negotiation was opened at The Hague in February, 1784, between John Adams and Baron de Thulemeier, long resident at the Dutch capital as Frederick's diplomatic representative. Thulemeier informed Adams that "an arrangement might be made between his Crown and the United States which would be beneficial to both." Adams pleaded want of instructions and told Thulemeier that he could do nothing except in concurrence with Franklin and Jay, both then at Paris. Adams's colleagues concurred heartily in the plan of negotiating with Thulemeier, and suggested that in order to save time a draft treaty should be drawn and transmitted to Congress, which could then issue a commission to negotiate and sign, together with special instructions for the modification of the draft.[16]

Adams's negotiation with Thulemeier proceeded according to the plan agreed to by Franklin and Jay. Adams submitted to the Prussian representative a copy of the Swedish treaty, which was forwarded to

[13] Dip. Corr. (Confed.), I, 40.

[14] *Ibid.*, 42–44.

[15] Franklin, Works (Smith's ed.), IX, 67.

[16] Adams to President of Congress, March 9, 1789, Dip. Corr. (Confed.), I, 435–7.

Frederick. Schulenberg, Frederick's minister, was directed to draft from it a *projet* to be submitted to Adams. The Prussian *projet*, probably in the main the work of Schulenberg, was delivered to Adams early in April, 1784.[17] In general the terms of the *projet* were identical with those of the Swedish treaty. Special provision was made (Article 3) for the importation into the United States of Silesian linens and articles of Prussian manufacture, and for similar entry of American staples into Prussia upon a most favored nation basis. The contraband list was identical, save that saltpetre and cuirasses were omitted. Linens were specified as non-contraband, while gold was struck from the list of free goods. The reservation as to convoy appearing in Article 12 of the Swedish treaty was omitted. By Article 6 of the *projet* consuls were to be on the most favored nation basis, while the Swedish treaty provided for a special regulation on the subject. More significant was the omission of provisions based on Articles 22 and 23 of the Swedish treaty. The first of these provided for a term of nine months after the declaration of war between the parties in order that the merchants and other subjects of the contracting parties respectively might settle their affairs and withdraw from the other country. Similar provisions had been inserted in the treaties with the Netherlands and France (six months), derived, as has been indicated, from the draft of 1776. Article 23 had forbidden the nationals of Sweden and the United States respectively to accept letters of marque from each other's enemies under penalty of punishment as pirates. This provision had been copied from the earlier treaties of the United States and from the draft of 1776.

Adams's objections to the Prussian *projet* were not serious. He reported to Congress, June 7, 1784, that "the treaty is ready for signature, unless Congress have other alterations to propose."[18] His principal amendment was that the provision for asylum for prizes should protect the rights reserved to France: "No shelter nor refuge shall be given in their ports or harbors to such as shall have made prizes of the subjects of his Majesty, or of the said United States; and if they are forced to enter by distress of weather or the danger of the sea, they

[17] Thulemeier to Adams, N. D. Dip. Corr., I, 442.

[18] Adams to President of Congress, June 7, 1874. Dip. Corr. (Confed.), I, 458.

shall be obliged to leave as soon as possible." Adams suggested this addition: that "in case of war between Prussia and France, it would not be admissible for the United States of America to derogate from antecedent treaties concluded with the Most Christian King in favor of a more recent obligation contracted with his Prussian Majesty." [19] Thulemeier then proposed that the provision for asylum for prizes be omitted altogether, substituting therefor the following provision, which was in every respect in harmony with the modern doctrine of neutrality: "The armed vessels of one of the contracting parties shall not conduct prizes that shall have been taken from their enemies into the ports of the other unless they are forced to enter therein by stress of weather or danger of the sea. In this last case they shall not be stopped nor seized, but shall be obliged to go away again as soon as possible." [20] This change was made at the suggestion of Frederick. The right to bring prizes into American ports was of no value to him. There was small likelihood of any Prussian vessel of war ever taking prizes into an American port. On the other hand, there was danger of falling into the difficulties which the Netherlands and Denmark had encountered through the operations of John Paul Jones. American privateers were likely in case of war to operate in European waters and to need European ports as places of refuge. For Prussia to accept such a provision would be to assume a burden without receiving a corresponding benefit. Adams insisted that such a provision was a necessity to the United States.

At this point Adams's negotiation with Thulemeier closed. Congress, on May 12, 1784, issued a commission to Adams, Franklin, and Jefferson to negotiate a treaty with Prussia. Adams waited at The Hague until about the first of September, when Jefferson arrived at Paris. The three commissioners, writing to Thulemeier from Passy, September 9, 1784, informed him "that we are here ready to enter on the negotiation, and to reconsider and complete the plan of a treaty which has already been transmitted by your Excellency to your Court, whenever a full power from his Prussian Majesty shall appear for that

[19] *Ibid.*, 462. No such conflict was provided for in the Swedish treaty, nor in Article 5 of the additional convention with the Netherlands.

[20] *Ibid.*, 462–3. John Adams, Works, IX, 203.

purpose." [21] These commissions were accompanied by new instructions adopted by Congress May 7, 1784. Several provisions of these new instructions required a material recasting of the draft which had in most respects been agreed upon by Adams and Thulemeier. The first was an elaboration of Article 22 of the Swedish treaty, which followed the terms of Article 18 of the Netherlands treaty, Article 20 of the French, and 23 of the draft of 1776, and had been omitted from the Prussian *projet*.[22] The article of the treaty had protected merchants and other enemy nationals for the space of nine months after the outbreak of war and provided them with passports for leaving the country. The Continental Congress now included special provision for all fishermen, all cultivators of the earth, and all artisans or manufacturers, unarmed, and inhabiting unfortified towns, villages, or places, who labor for the common subsistence and benefit of mankind, and peaceably following their respective employments, shall be allowed to continue the same, and shall not be molested by the armed force of the enemy, in whose power, by the events of war, they may happen to fall; but if any thing is necessary to be taken from them, for the use of such armed force, the same shall be paid for at a reasonable price; and all merchants and traders, exchanging the products of different places, and thereby rendering the necessaries, conveniences, and comforts of human life more easy to obtain, and more general, shall be allowed to pass free and unmolested; and neither of the contracting Powers shall grant or issue any commission to any private armed vessels empowering them to take or destroy such trading ships, or interrupt such commerce.[23]

The next provision of the new instructions related to contraband. The Swedish treaty, in Article 9, followed the earlier treaties and the draft of 1776, including the restricted list appearing in the Franco-

[21] Dip. Corr. (Confed.), I, 503. Similar commissions were issued by the Continental Congress to Adams, Franklin, and Jefferson to negotiate commercial treaties with Russia, Germany (Austria), Prussia, Denmark, Saxony, Hamburg, England, Spain, Portugal, Naples, Sardinia, the Pope, Venice, Genoa, Tuscany, the Porte, Morocco, Algiers, Tripoli, and Tunis; *ibid.*, 80, 501. The Prussian treaty was the only one negotiated under these commissions.

[22] The same principle appears in Article 2 of the commercial treaty between Great Britain and France, 1713. *Cf.* also Article 14 of the treaty of peace between the same Powers, 1713; Article 17, Great Britain and Portugal, 1642; Article 36, Great Britain and Spain, 1667; Article 12, Great Britain and Russia, 1766. See Camillus (Alexander Hamilton), Defense of the [Jay] Treaty, Letter 22.

[23] Dip. Corr. (Confed.), I, 81–82.

British treaty of 1713.[24] This proposition, numbered four in the resolutions of the Continental Congress, and that numbered five in the same resolution, were adopted verbatim from those made by the American peace commissioners at Paris, June 1, 1783, for insertion into the definitive treaty of peace with Great Britain.[25] The proposition numbered five in the instructions was that contraband, described as "arms, ammunition, and military stores of all kinds," should not be confiscated, but might be requisitioned. Both propositions were unquestionably originally the work of Franklin, and contained ideas which in part had been suggested by him during the negotiations of the preliminary articles of peace. Writing Oswald, January 14, 1783, Franklin said,

> I enclose two papers that were read at different times by me to the Commissioners; they may serve to show, if you should have occasion, what was urged on the part of America on certain points: it may help to refresh your memory. I send you also another paper, which I once read to you separately. It contains a proposition for improving the Law of Nations by prohibiting the plundering of unarmed and usefully employed people. I rather wish than expect that it will be adopted. . . . It has not yet been considered by my colleagues, but if you should think or find that it might be acceptable on your side, I would try to get it inserted in the general treaty. I think it will do honour to the nations that establish it.[26]

The proposition referred to is in the form of a draft article for a treaty. It is identical with the fourth item of the new instructions of May 27, 1784.

Oswald was not returned for the negotiation of the definitive treaty, and David Hartley, an old friend of Franklin and "a strong lover of peace," took his place. Adams and Jay agreed to the articles which Franklin had outlined to Oswald, and Hartley sent them to London for the approval of the British Ministry. A copy was delivered to Vergennes at the same time. He acknowledged its receipt with the statement that he would need time to examine the articles before giving his judgment as to their wisdom in so far as they related "to our

[24] This contraband list antedates the treaties of Utrecht and is found without material change in the treaty between England and Sweden of 1656, Article 2, and in several other treaties between that time and 1713, as well as later. See Atherley-Jones, Commerce in War, 15, *seq.*, for comparative lists.

[25] Wharton Dip. Corr. Rev., VI, 471. [26] Franklin, Works, IX, 3, 4.

reciprocal interests." [27] Franklin urged Hartley to procure for his nation "the glory of being, though the greatest naval power, the first who voluntarily relinquished the advantage that power seems to give you of plundering others, and thereby impeding the mutual communications among men of the gifts of God, and rendering miserable multitudes of merchants and their families, artisans, and cultivators of the earth, the most peaceable and innocent part of our human species."[28]

After the formal presentation of the articles to Hartley, the negotiations were continued until August, when the British Ministry decided to agree to no alterations of the provisional articles, and to base the definitive treaty upon them only. All commercial matters were to be left to be arranged by a separate treaty to be negotiated later. Thus rejected by Great Britain, Franklin's articles were adopted in the next year by the Continental Congress and returned as familiar provisions to Franklin and Adams, then about to negotiate with Prussia. The idea of "delivering out" articles classed as contraband was added by Congress to Franklin's proposition of 1783 in these words:

> But if the other contracting party will not consent to discontinue the confiscation of contraband goods, then that it be stipulated, that if the master of the vessel will deliver out the goods charged to be contraband, he shall be admitted to do it, and the vessel shall not, in that case, be carried into any port, but shall be allowed to proceed on her voyage.

This provision is the same, *mutatis mutandis*, as that in Article 13 of the treaty with Sweden, Article 25 with the Netherlands, Article 25 with France, and Article 28 of the draft of 1776.[29]

Another important section of the new instructions adopted some

[27] Franklin to Vergennes, May 5, 1783; Vergennes to Franklin, May 5, 1783. *Ibid.*, 38–39.

[28] Franklin to Hartley, May 8, 1783. *Ibid.*, 40.

[29] Mr. Atherley-Jones (Commerce in War, 388) says "The first conventional application of this practice [of delivering out contraband] appeared in the treaty of commerce between Russia and Denmark of October 8/19, 1782." It had appeared, as indicated, in two treaties negotiated before that time by the United States, and was no invention by the authors of the draft treaty of 1776. The same provision will be found in the Franco-British commercial treaty of 1713, Article 26, which was renewed February 10, 1763, and again broken in 1778 by the outbreak of war. It was a popular provision in commercial treaties between 1780 and 1856.

of the principles of Armed Neutrality: one, that free ships make free goods, with the omission of enemy ships, enemy goods; the other, that blockades, to be lawful, must be maintained by a sufficient naval force so as to expose blockade runners to "imminent danger." [30] The first was an important departure from the earlier American policy which had adopted the stricter French practice of holding "enemy ships, enemy goods," which bore more severely upon neutrals than did the old rule of the *Consolato*, followed by England and early contended for by Franklin as the unwritten rule of international law. The doctrine that blockades should be effectively maintained was one of the important maxims of the Armed Neutrality.

A counter *projet* prepared by the American commissioners in accordance with their new instructions was sent to Thulemeier in December, 1784, who sent it to the king with an enthusiastic approval of the new provisions. Frederick, in turn, asked his ministers for their opinion of them. Objecting to certain minor provisions which appeared for the first time in the counter *projet*, they expressed disapproval of the article providing for neutral asylum for prizes. Generally, however, they took the position that as war aimed, not at the ruin of individuals, but at a lasting peace, privateering should be regulated or abolished, and that the ordinary commerce of neutrals should not be interrupted by war. Only such neutral goods, therefore, ought to be interfered with as could be used directly in war or were sought to be taken to a blockaded port. The new provisions went further than this, yet they felt that the king might well agree to them as in harmony with the spirit of the age and for his greater glory. Comparatively few changes were made in the counter *projet*, and Frederick finally agreed to include the article on asylum for prizes.[31]

By the last of May, 1785, the treaty was in definitive form. In June it was translated into French and sent to Frederick, who authorized its signature. By the time the treaty was ready to be signed the

[30] *Cf.* Danish declaration, July 8, 1780; De Martens, *Causes Célèbres*, 2d ed., III, 278. It is an interesting coincidence that this exposition of the principles of the Armed Neutrality in 1780, the denial of the right of a neutral to allow the exportation of munitions in 1870, and Germany's contentions as to the neutral duties of the United States from 1914 to 1917 were made by three Counts von Bernstorff.

[31] Kapp, *op. cit.*, *passim*.

American commissioners had separated. Franklin signed at Passy on the 9th of July, Jefferson at Paris on the 28th of July, and Adams at London on the 5th of August, and, finally, Thulemeier signed at The Hague on the 10th of September, 1785. The original of the treaty was in French and in English. When Franklin signed, the French text had not reached Paris, and he signed only the English text. Jefferson and Adams signed both originals, as did Thulemeier. The English original was then sent to the United States for ratification by the Continental Congress. This took place May 17, 1786, and ratifications were exchanged at The Hague late in the following October.

III

THE TREATY OF 1799

The duration of the treaty of 1785 covered a decade, the events of the last portion of which immediately involved the United States in the contests of the world brought on by the aggressive wars of the French Republic. As the contest continued, the United States was faced for the first time with the difficulties of preserving neutrality in a contest between sea-power, on the one hand, and a continental Power seeking to overthrow the existing sea-power, upon the other. The situation resulted in a remolding of the foreign policy of the United States by the Federalists. The Jay Treaty may be taken as a measure of their success or failure. The question of the renewal of the treaty must be regarded in the light of the Jay Treaty and the effect which its provisions had upon the continental European Powers.

Jay was instructed, it will be remembered, to seek the adoption by England of the principles of the Armed Neutrality and generally for the provisions of the Prussian treaty, even "if attainable by abolishing contraband altogether." [32] This squarely challenged those principles of maritime practice for which England had contended. Any departure, however slight (and the departure was very slight), from British practice which Jay managed to incorporate into the treaty of 1794 was to that extent a victory for the traditional American (and hence continental) policy, broken in upon, it is true, by the series of

[32] Instructions to Jay, Am. State Papers, F. R., I, 473.

treaties which from time to time England had negotiated down to that of 1786 with France.[33] The last short-lived treaty renewed the restricted contraband list of 1713, included the same list of free goods, provided for delivery out of contraband, as well as for free ships, free goods, enemy ships, enemy goods, and asylum for prizes.[34] The outbreak of the war between England and France abrogated this treaty and gave rise to a series of reprisals affecting neutral commerce which culminated in the final entry of the United States into war against Great Britain in 1812. With this treaty set aside, Great Britain fell back upon the strict rules of the so-called unwritten law of nations for which she had contended at the time of the Silesian loan controversy. What England had been willing to recognize with France in 1786 was not likely under the change of circumstances to be adopted by her in the negotiation with Jay in 1794. The acceptance by Washington and Congress of Jay's treaty represents their abandonment of the earlier American policy. This was thought to be necessary because of the peculiar character of the conflict between British sea-power and a continental land-power seeking to dominate the sea. "Free ships make free goods" was surrendered. The contraband list, while restricted, included naval stores. Instead of a definite free list, conditional contraband was provided for, the articles of which were not to be confiscated, but to be requisitioned and paid for. Foreign enemy privateers were not to be allowed to arm in either British or American ports or to sell their prizes therein. The provision for asylum for prizes followed in general the provisions of the Prussian treaty, but added:

> No shelter or refuge shall be given in their ports to such as shall have made a prize upon the subjects or citizens of either of the parties; but if forced by stress of weather or the dangers of the sea to enter therein, particular care shall be taken to hasten their departure, and to cause them to retire as soon as possible. Nothing in this treaty contained shall, however, be construed to operate contrary to former and existing treaties with other sovereigns or states. But the two parties agree that while they continue in amity neither of them will in future make any treaty that shall be inconsistent with this or the preceding article [as to foreign privateers].

[33] *Cf.* Neutral Rights, by J. F. W. Schlegel, American ed., 1801, for an examination of these.

[34] De Martens, *Recueil*, IV, 155.

Most important perhaps of all was Article 17, which directly recognized the old rule of the *Consolato*.

Hartley, in 1783, had said that by nature England and the United States must be closely associated either as enemies or as friends. The Jay Treaty recognized this and chose the latter alternative. The effect was seen when the Prussian treaty was about to expire. Steps were taken by Adams to renew it. Passing by the objections raised as to the appointment of John Quincy Adams as minister to Prussia in 1796, objections partly personal and partly based upon opposition to the creation of such a mission, and partly, too, upon the change in the policy of the United States in shifting from the principles of the treaty of 1785 to those of 1794, the appointment was ratified by the Senate.[35]

Pickering sent instructions for the negotiation of the treaty to John Quincy Adams, who was then at The Hague, expecting to be sent to Portugal, to which he had previously been appointed as minister. Pickering instructed Adams to omit the provision of the earlier treaty (copied from Article 17 of the Swedish treaty) exempting the vessels of either party from embargo so as to render them liable to a general embargo, a provision which had caused embarrassment to the United States in 1794. The twenty-third article, which forbade the commissioning of privateers to prey upon the commerce of the other in case of war, was also to be omitted. "Considering," wrote Pickering, "the abuses too often committed by privateers and the spirit in which privateering is commenced and prosecuted, it has sometimes appeared desirable to abolish the practice altogether. But the policy of this principle, as it respects the United States, may well be doubted. We are weak at present in public vessels of war. . . . Our chief means, therefore, of annoying and distressing a maritime enemy must be our privateers." The principle that free ships make free goods was to be abandoned. This doctrine, as expressed in all the previous treaties of the United States, except the Jay Treaty, was "of little or no avail, because the principle is not universally admitted among the maritime

[35] John Quincy Adams, Memoirs, I, 195–7. Senate Executive Journal, I, 158–9. The Senate voted, eighteen to eleven, against the motion that "there is not, in the opinion of the Senate, any present occasion that a minister be sent to Prussia." See Wheaton's International Law, secs. 457–470, omitted in Phillipson's recent edition.

nations. It has not been regarded in respect to the United States when it would operate to their benefit; and may be insisted upon only when it will prove injurious to their interests." Later Pickering added, "The abandonment of that principle was suggested by the measures of the belligerent Powers during the present war, in which we have found that neither its obligations by the pretended modern law of nations, nor the solemn stipulations of treaties, secured its observation; on the contrary, it has been made the sport of events."[36] Further, Pickering proposed to omit the provision abolishing the right to confiscate contraband and to substitute therefor the stipulations of the Jay Treaty, including naval stores as contraband.

The instructions to Jay in 1794 followed the lines of the Prussian treaty of 1785; those to Adams in 1797 followed the provisions of the Jay Treaty; in the three years the United States as a neutral had completely reversed the commercial policy adopted in 1776 when a belligerent. The administration judged it impossible for the United States as a neutral in a great maritime war successfully to contend for the old policy. Some leeway was given Adams, depending upon an

[36] Pickering to John Quincy Adams, Am. State Papers, F. R., II, 250. Writings of John Quincy Adams, II, 188–191. We have here the adoption of the American position that the rule of the *Consolato* was the true rule of international law; that "free ships make free goods" was valid only when stipulated in treaties. The phrase "pretended modern law of nations" refers to the continental position based on the law of nature. The English doctrine was adopted by Marshall for the reason that "the United States, having at one time formed a component part of the British Empire, *their* prize law was our prize law. When we separated it continued to be our prize law, so far as it was adapted to our circumstances and was not varied by the power which was capable of changing it." Bentzon *v.* Boyle, Scott's Cases, 600. Though in many respects influenced by the law of nature (as in Fletcher *v.* Peck) Marshall did not adopt the theory that "free ships make free goods" was based on the law of nature, as held by the continental writers. It is suggested that Marshall's doctrine was influenced by the Federalist position from 1794 to 1799. Sir William Scott, afterwards Lord Stowell, sent to Jay, Sept. 10, 1794, a memorandum on prize court procedure, in which was incorporated a portion of the famous report of the law officers of the Crown made in 1753 at the time of the Silesian loan case. This portion set forth the doctrine of the *Consolato* as against free ships, free goods. Am. S. Papers, F. R., I, 494; Montesquieu characterized the report as *réponse sans réplique*. Vattel called it *un excellent morceau du droit de gens*. Law and Custom of the Sea (Naval Records Society, ed. Marsden), II, 348 n.

early peace or the continuation of the war. "If the negotiations for peace should be broken up, and the war continue, and more especially if, as you have conjectured, the United States should be forced to become a party in it, then it would be extremely impolitic to confine the enterprises and exertions of our armed vessels within narrower limits than the law of nations prescribes."

Adams received these instructions by the last of October, 1797. While he was in no sense pro-French, neither was he converted to the pro-British position of Pickering. "It is to my mind very questionable whether it would be expedient to propose the alterations suggested in your letters, except that relative to embargo," he wrote Pickering. "The principle of making free ships protect enemy's property has always been cherished by the maritime Powers who have not had large navies, though stipulations to that effect have in all wars been more or less violated. In the present war, indeed, they have been less respected than usual, because Great Britain has had more uncontrolled command of the sea, and because France has disclaimed most of the received and established ideas upon the laws of nations and considered herself as liberated from all the obligations towards other states which interfere with her present objects or interests of the moment." Nevertheless, as every abandonment of neutral rights would strengthen British power, he insisted that it was the policy of every naval state to maintain "liberal maxims in maritime affairs against the domineering policy of Great Britain." [37]

After Adams arrived at Berlin, Frederick II died. Many vexatious delays interfered with the opening of negotiations, and not until May 19, 1798, did Adams receive credentials to be presented to Frederick's successor. With them Pickering sent new instructions. They were drafted upon the theory that the United States would soon be in the war against France. "With this prospect before us, no considerations occur which should induce" the admission of free ships, free goods. The recent French decrees which stated that the character of a vessel should be determined by the origin of its cargo, irrespective of ownership, was, it had been claimed, directed exclusively against the American merchant marine.

[37] John Quincy Adams to Pickering, Oct. 31, 1797; Writings, II, 218.

In this case a reversal of that stipulation is positively to be refused. The Swedish and Prussian commerce will then be only on the footing of the commerce of Denmark, with whom we have no treaty; and if we must be involved in the war, it will be desirable that the commerce of those three Powers, in relation to the United States, should rest on one and the same principle. But if this iniquitous French law exists (and we have no reason to doubt it), will all the northern Powers submit to it? We hope not. We hope that the inordinate ambition of France, and avowed design to subjugate all Europe (of which she already calls herself "the great nation" and "the conqueror") will excite the resistance of all the Powers whom her arms have not reached and arouse anew those whom the course of events have induced to submit. At present Britain appears to be the only bulwark against the universal domination of France, by sea as well as by land.[38]

Prussia, however, had made a treaty of peace with France, and Haugwitz, with whom Adams negotiated, was of notoriously Francophile sympathies. Discussing the French decrees against neutral commerce, Haugwitz told Adams that three alternatives were presented: one, tamely to submit and take their law from France (which he hoped they would not do); two, to throw themselves into the arms of England; or, three, to unite neutral nations for the defense of their rights, as another Armed Neutrality against France and England. Adams agreed that the third was the plan which the United States favored, though it was certainly not in line with his instructions, which adopted the second. Upon the receipt of this report of Adams's interview with Haugwitz, Pickering answered by a letter, which is remarkable not only for the light which it throws upon the policy of the Adams administration in its attitude toward France and England, but even more so for its relation to the situation in which the United States was put from August, 1914, to April 6, 1917. Let "Germany" be substituted for "France" and "submarine warfare" for "French decrees" (which, however tyrannical, at least had regard for human life), and the letter of Pickering becomes an exposition of the position of the United States as a neutral in the great war. The impotence of the northern Powers today results from the same conditions as in 1798, except that they are now more immediately at Germany's mercy than they were in 1798 at the mercy of France.

[38] Pickering to John Quincy Adams, March 17, 1798, Am. State Papers, F. R., II, 251.

Your conversation with the Prussian minister, as detailed in your letter of the 19th of February, is very interesting. The third of the alternatives mentioned by him, to maintain the dignity of the rights of neutral commerce, would, as you assured him, be most agreeable to the United States in reference to France. Both the others we should certainly reject. But at present how is the small maritime force of the northern neutral powers of Europe, with or without the inconsiderable armed ships of the United States, to control the British marine? The arming of Sweden and Denmark for this purpose in 1794 we know was perfectly futile. And in the existing state of things it would be highly impolitic to embarrass Great Britain by any maritime combination. For however much reason the neutral nations have to complain of her measures, the little finger of France in maritime depredations is thicker than the loins of Britain, and the safety of the portion of the civilized world not yet subjugated by France greatly depends on the barrier opposed to her boundless ambition and rapacity by the navy of England. If this navy were crushed or subjected to the power of France she would instantly become the tyrant of the seas, as she is already of the European continent. At present her rapacity is confined by the inferiority of her naval force which therefore exerts itself chiefly in acts of piracy on neutral commerce. But were the British navy subdued, France would insultingly prescribe law to the whole maritime world. If British cruisers commit aggressions, there is a well-founded expectation of redress, at least, in the supreme courts; but those of France, from the lowest to the highest, are generally corrupt and prompt to establish violence in the forms of law, and where the judges felt compunction (a most rare occurrence) the terror of the government enforces the execution of its iniquitous decrees. I refer to their practice in France. In their consular courts in Spain, and their West Indian tribunals, it is, if possible, still worse. Yet from the decisions of the consuls in Spain, although a number of appeals have been made to the courts in France, I do not recollect a single instance that has proved successful. In the West Indies nobody thinks of entering an appeal.

If there were to be a combination of the neutral powers to protect their commerce, it is against France that their force should be directed. But this is scarcely to be hoped for in respect to any of the powers to whose territories her armies can march, until her monstrous tyranny becoming still more insupportable at home as well as abroad, all Europe shall rise to overturn the execrable government that wields her immense force.[39]

Meanwhile Adams continued his efforts toward a revival of the system of the Armed Neutrality, though doubting that the United

[39] Writings of John Quincy Adams, II, 259.

States would be permitted to remain a neutral. He urged the arming of merchant vessels to oppose the French decrees at the same time that his father, as President, was urging the same policy, and seemingly without any suspicion that the arming of such vessels would be a departure from strict neutrality, as, indeed, it was not.[40] Still unwilling to surrender the principle of free ships, free goods, concerning which he agreed with Hübner and Lampredi that it was sustained by the law of nature, he suggested that a compromise might be made which would have the merit of consistency and mutuality. France, he said, had uniformly professed her attachment to the principle, and only departed from it because of England's practice. "It appears to me, therefore, that the stipulations ought properly to be made contingent," and that the parties to a commercial treaty "should agree that in all cases, when one of the parties should be at war and the other neutral, the bottom should cover the property, *provided the enemy of the warring power* admitted the same principle and practiced upon it in their courts of admiralty; but if not, that the rigorous rule of the ordinary law of nations [*i.e.*, the rule of the *Consolato*] should be observed." [41] Pickering agreed to Adams's suggestion, provided the stipulation should apply to "all neutral nations, as well as the contracting party remaining neutral." [42]

In July, Adams formally presented his plans for a renewal and alteration of the treaty of 1785. These were strictly in line with Pickering's instructions: the substitution of the rule of the *Consolato*, the recognition of the doctrine of contraband, including naval stores and material for ship-building, the abolition of special embargoes, and excluding the article against privateering. The provision as to asylum for prizes, he insisted, required alteration as in conflict with the present engagements of the United States with France and England.[43]

[40] John Quincy Adams to Pickering, March 8, 1798. Message of John Adams, March 14, 1798. John Quincy Adams, Writings, II, 267. The French had threatened to consider every armed ship as enemy and the sailors thereof as pirates.

[41] Adams to Pickering, May 12, 1798; Writings, II, 287. Adams introduced this provision into the Florida treaty, Article 12.

[42] Pickering to Adams, Sept. 24, 1798. *Ibid.*, II, 287.

[43] John Quincy Adams to the Ministers of State, etc., July 11, 1798. Am. State Papers, F. R., II, 252.

The Prussian commissioners declined to abandon free ships, free goods as a principle universally held by the northern nations, but, realizing the impossibility of effecting a recognition of it, in the circumstances, proposed that they agree to work for the adoption, after the conclusion of the war, by the great maritime Powers of Europe, of an arrangement "as would serve to establish upon fixed and permanent rules the liberty and security of neutral navigation in future wars." While willing to adopt the doctrine of contraband, they insisted upon the list as inserted in the treaty between Russia and Prussia of 1781, the traditional "restricted lists," rather than the one contained in the Jay Treaty. Ship-timber was not to be included as contraband because it was one of Prussia's principal productions. As to the prohibition of privateering under Article 23 of the old treaty, this was dictated, they said, "doubtless by the purest motives of benevolence and humanity, and it is not to be expunged without regret; but as this pleasant theory can with difficulty be put into practice, it only remains to renounce it, especially as the policy of the United States may be effected by it." [44]

In transmitting the Prussian answer, Adams said that unless he could admit free ships, free goods, and exclude ship-timber from the list of contraband, he had "no sort of expectation that the treaty would be renewed." [45] He finally agreed to eliminate ship-timber from the contraband list, and to say nothing in the treaty relative to free ships, free goods, thus abandoning the conditional declaration which he had suggested to Pickering. Adams argued, though doubtless with little enthusiasm, that free ships, free goods was not the rule of international law. The contraband list required more precise determination. One statement is significant: "It would . . . be proper to omit the term 'provisions,' which appears synonymous with that of 'munitions of war' and which is susceptible of being interpreted in a broader sense than intended by the high contracting parties." [46]

This was agreed to by the Prussian negotiators. "It is to be pre-

[44] Finckenstein, Alvensleben, and Haugwitz to John Quincy Adams, Sept. 25, 1798. Am. State Papers, F. R., II, 254.

[45] Adams to Pickering, October, 1798, *Ibid.*, 253.

[46] Adams to the Prussian Ministers, Dec. 24, 1798, *ibid.*, 263.

sumed," they wrote, "that the United States of America, who in their first treaty with Prussia had so clearly manifested the generous intention to withdraw, as much as possible, navigation and commerce from the effects of war, will not on this occasion evince a disposition less liberal than theirs, and we, therefore, believe that we can appeal with confidence to their ministers."[47] With this adjuration, they submitted their *projet* of a treaty. Adams suggested a few changes, omitting the stipulation that ships of war should not approach within cannon-shot of neutral vessels. This, he said, was seldom or never observed, and was difficult, if not impossible, of execution. A new *projet* including all of Adams's suggested amendments was then drawn and the treaty was signed July 11, 1799, on the thirty-second birthday of the American negotiator.

The first eleven articles of the treaty of 1785 were renewed in their entirety. Article 12 (free ships, free goods) was not renewed. The new twelfth article followed the Prussian suggestion that the whole matter be left for general negotiation after the war. Article 13 contained a short list of contraband articles (ship-timber omitted) which, however, were not to be confiscated, but to be detained and paid for, or delivered out. Article 14 was new and provided revised specifications for sea-letters. Article 15 was the same as that in the treaty of 1785, with the prohibition of approach eliminated. Article 16 permitted general embargoes. Articles 18 to 27 were the same as in the earlier treaty, except that Article 23 omitted the prohibition of privateering. The three great doctrines of the older policy were thus abandoned or suspended: free ships, free goods; the abolition of contraband, and of privateering. The negotiation had lasted more than a year. Writing to Pickering in September, 1798, John Adams stated that he was not at all mortified at the delay of the treaties with Prussia or Sweden, having "no ardent desire of any treaties till the crisis in Europe is more decided." "Our commerce is of more consequence to them than theirs to us; and with or without treaties, we shall have all we want."[48]

The X, Y, Z affair and trouble generally with France made the renewal of the Prussian treaty a matter of little consequence, and not

[47] Prussian Ministers to Adams, Feb. 19, 1799, *ibid.*, 265.

[48] John Adams, Works, VIII, 595, 599.

desirable unless with material alteration. The treaty in duplicate, with French and English texts, was sent to the Senate by President Adams December 6, 1799, and referred to a select committee, of which Bingham was chairman. This committee advised ratification January 28, 1800, which was accomplished February 18 by a vote of twenty-six to six.[49] Ratifications were exchanged at Berlin June 22, 1800, and the treaty was finally proclaimed November 4, 1800. As its duration was for ten years after exchange of ratifications the treaty expired June 22, 1810, in the midst of the new series of international difficulties directly culminating in the War of 1812.

IV

THE TREATY OF 1828

John Quincy Adams was recalled from Berlin in 1801 at the President's suggestion. The legation was discontinued until 1835. Prussia sent a *chargé* to the United States in 1825. The renewal of the Prussian treaty in 1828 belongs to a new period of commercial treaty negotiations. The first treaty with Sweden had been for the most part renewed for eight years in 1816. The Prussian treaty had remained since 1810 without renewal. The new period begins with the recognition of the Latin-American Republics, with which commercial treaties were first made in the administration of John Quincy Adams. When Niederstetter, the new Prussian *chargé*, was presented in June, 1825, the President recalled that the relations between the United States and Prussia "had always been interesting and uninterruptedly friendly; that they had also been distinguished by the negotiations, at two different periods, of treaties in which the first examples had been exhibited to the world of national stipulations founded upon the most liberal principles of maritime and commercial law."[50] Recalling that Adams had favored the retention of the principal provisions of the treaty of 1785 and only reluctantly agreed to sign the treaty of 1799,

[49] Senate Executive Journal, I, 326–7, 337–40. Voting in the negative were Baldwin, Brown, Langdon, Mason, Nicholas, and Pinckney. *Cf.* Secretary Lansing to Von Bernstorff, March 2, 1916, special supplement to this JOURNAL, October, 1916, 392.

[50] John Quincy Adams's Memoirs, VII, 25.

as it departed from the lines of the earlier instrument, it is not surprising that the plan for a new treaty should have followed that of 1785 rather than that of 1799.

The world then was in the midst of the forty years' peace. British pretensions, against which the United States had ranged herself, had abated somewhat since the end of the Napoleonic Wars. The negotiation, of which the records are short, was comparatively simple. Clay proposed the revival of Articles 12 to 24, inclusive, of the treaty of 1798, and Article 12 of the treaty of 1785. To all of this Niederstetter consented. The provision in Article 23 of the treaty of 1785, prohibiting privateering, was also suggested by Clay. As to this Niederstetter had no instructions. The recently negotiated treaty with Sweden and Norway contained a provision relating to blockades, which provided that a vessel bound to a blockaded port should not be captured on its first attempt to enter the port, unless the vessel knew or ought to have known that the blockade was in force. This article Niederstetter proposed to have included, and the President acquiesced, although Clay desired a more precise definition of blockade, as to which the Prussian *chargé* had no instructions.

In general, the treaty, which was signed May 1, 1828, followed in Articles 1 to 11, inclusive, and Article 13, the recent treaty with Norway and Sweden. Article 12 renewed Article 12 of the treaty of 1785 and Articles 13 to 24, inclusive, of that of 1799, with the exception of the last paragraph of Article 19, which had reserved rights in favor of Great Britain under the Jay Treaty. More general reservations were now made which applied to all articles revived in favor of all the treaties of the United States made between 1810 and 1828. The vexed question of the status of private property at sea reappeared. While "free ships, free goods" was re-adopted, the provision against privateering was omitted, as was that abolishing contraband. The diversity of practice and opinion in 1799 continued in 1828. Therefore, Article 12 of the new treaty concluded with a renewed expression of the desire to see adopted "further provisions to ensure just protection and freedom to neutral navigation and commerce, advance the cause of civilization and humanity," and the engagement was made "to treat on this subject at some further and convenient period." Not until the Hague

and London Conferences was a "convenient period" presented. Unlike the earlier treaties with Prussia, the duration was for the term of twelve years, after which, if not previously denounced by one year's notice, the new treaty was to continue indefinitely.

V

THE TREATY FROM 1828 TO 1917

As the treaty of 1828 provided a method for termination by notice, there is no ground for reading into it what not only Treitschke, but Phillimore as well, said was to be understood in all treaties, the clause *rebus sic stantibus*.[51] The maxim that every treaty is to be understood *rebus sic stantibus*, Wharton held to apply to all cases in which the reason for a treaty has failed or there has been such a change in circumstances as to make its performance impracticable except at an unreasonable sacrifice.[52] When denouncement by notice may take place at any time, it is idle to take the position that a treaty is void through obsolescence. The purpose of a provision for unilateral denunciation is to furnish a way out of the inconvenience growing out of changed circumstances, an excellent example of which may be seen in the denunciation of the Russian treaty of 1832. If a treaty is actually impossible of performance, for whatever reason, whether because of the failure of status of one of the parties as a subject of international law, or because of the non-existence of the subject-matter, or because it is generally *functus officio*, the treaty drops of itself as a whole, the denunciation article included.

In but one provision of the treaty, that of Article 19 on neutral asylum for prizes, would it seem that a good argument might be made that the treaty is obsolete because in conflict with modern international law. Yet Kohler held that the whole of Article 13 of the treaty of 1799 (renewed in 1828), by which contraband was to be detained but not confiscated, was obsolete. "It contradicts the modern development of international law, as was expressly recognized by America at London," he says. Krauel, in discussing the *Frye* case, described the contraband

[51] Phillimore, International Law, II, 58–59.

[52] Wharton, International Law Digest, II, 58. Moore, Digest, V, 319.

article as a curiosity in international law, not binding upon Germany in the present war, and in opposition to the provisions of the German Prize Regulations of 1909. So also Fleischmann, defending the sinking of the *Lusitania*, argued that the treaty was no longer binding.[53]

A sufficient answer to all these claims is that no one, prior to the present war, took any such position, and that in no official discussion of the treaty, either by Germany or the United States, was such a claim made; nor were any steps taken by either of the parties to denounce it by notice. Prussia recognized the validity of the treaties in 1861, our Civil War giving to its peculiar provisions "a practical meaning."[54] In 1870 the Prussian Government expressly recognized the binding force of Article 13 of 1799 (renewed in 1828) to the effect that contraband was not to be confiscated. In the proclamation of neutrality at the outbreak of the Franco-Prussian War, the validity of the article providing for asylum for prizes was specifically recognized by the United States.[55] In 1900 the German Chancellor stated that German commercial relations with the United States rested upon treaty-rights contained in the Prussian-American convention of 1828 and in similar agreements with the other German maritime states.[56]

On the American side, the treaties are contained in the Statutes at Large, and in so far as not interfered with by later statutes, are a part of the law of the land. They were indirectly upheld in a recent decision of the United States Supreme Court (United States *v.* Pulaski, decided March 6, 1917). As international acts they have always appeared in the official compilations of the treaties in force.[57] Indeed, no intima-

[53] *Zeitschrift für Völkerrecht*, IX, 19, note; Krauel in same, 18–19; Fleischmann, in same, 172–3. *Cf.* B. Schmidt, *Über die Völkerrechtliche clausula rebus sic stantibus*, in Jellinek's *Staats- und Völkerrechtliche Abhandlungen*, Vol. VI, 25, whose statement, that international treaties are to be set aside because of changed circumstances only when the highest interest and aims of the state are necessarily involved, is quite as conservative as that of Wharton, and in striking contrast with other contemporary German writers like Heilborn and Ullmann.

[54] Circular of Prussian Minister of Commerce, Aug. 16, 1861, quoted by Niemeyer, *Urkendenbuch zum Seekriegsrecht*, I, 22.

[55] Moore, Digest, VII, 469. Richardson's Messages, VII, 87.

[56] Quoted by Niemeyer, 122.

[57] Niemeyer cites the appearance of the treaty in these official compilations as evidence that the United States regards them as still in force. Fleischmann says

tion can be found that the treaty was not binding upon Prussia down to the formation of the Empire, or upon the German Empire since that time, until the doctrine of *rebus sic stantibus* was raised against it in connection with the *Frye* case in Kohler's *Zeitschrift* in 1915, in the same number, indeed, in which Kohler asserted that international law based on international treaties can no longer be.[58]

With the outbreak of the great war, the United States as a neutral was entitled to the benefits and burdened with the duties as set forth in the treaty of 1828 and the articles of the earlier treaties revived therein. It was not the first time that this had been the case, for Prussia had been a belligerent in 1866 and 1870, as the United States had been a belligerent and Prussia a neutral from 1861 to 1866. The provisions of the treaty covering the relations of neutrality, therefore, stand together as a standard of rights and duties for Germany and the United States between August, 1914, and April, 1917. These provisions are contained in Articles 12 of 1785, 13 to 20 of 1799, and 13 of 1828. The first is the famous "free ships, free goods" article. Going beyond the traditional statement of this principle, the article provided for complete liberty for either party to trade with a nation at war with the other to the extent that free intercourse and commerce of the neutral should not be interrupted. "On the contrary, *as in full peace*, the vessels of the neutral party may navigate freely to and from the ports or on the coasts of all belligerent parties." The treaty of 1785 did not recognize blockade, as that of 1828 did (Article 13). Similarly, the first treaty did not recognize contraband, as the last one did, by renewing Article 13 of 1799. Therefore, these three articles must be reconciled, and they may be as follows: the merchant vessels of the United States as a neutral had the right to navigate freely to and from the ports and on the coasts of Great Britain and her allies, save when a lawful blockade of a port or ports, properly notified and effectively maintained, had been declared, unless indeed such vessels carried contraband, which was limited to arms, ammunition, and military stores.

that Niemeyer's statement has no bearing upon the question of the validity of the treaty as against Germany.

[58] Kohler, *Das neue Völkerrecht*. See English translation and foreword in Michigan Law Review, June, 1917.

Even then the contraband was not to be confiscated, but could be requisitioned and paid for or delivered out. The inference is that neutral prizes could not be destroyed. Furthermore, the implication of the contraband article is that neutral merchantmen had the right to arm, for the "quantity of arms necessary for the use of the ship," and proper for the use "of every man serving on board the vessel or passenger" was to be free. Merchant vessels of the United States were to be guaranteed regulation of visitation and search, in which process German naval officers and sailors were not to "molest or insult in any manner whatever the people, vessels, or effects of the other party" (Article 15 of 1799, renewed in 1828). In case of blockade (Article 13 of 1828) the neutral merchantman might be "captured or condemned," or "detained or condemned," but not until after it had had actual warning or imputed knowledge of the blockade. Furthermore, the ports only, and not the coasts or waters contiguous to belligerent territory, are mentioned as subject to blockade. These are special treaty-rights in favor of the neutral. No provision seeks to limit the exercise by neutrals of rights existing by the unwritten law of nations. Those mentioned are either declaratory of international law or concessions beyond it by the belligerent in favor of the neutral.

The duties of neutrals are comprised in Article 19 of 1799 (renewed in 1828) on asylum for prizes. As has been seen, this article antedated the development of all modern doctrines of neutral duties.[59] The phrase used in the English version of 1828 states that "the vessels of war . . . shall carry freely wheresoever they please the vessels and effects taken from their enemies." The French versions of 1828, 1799, and 1785 used the same phrase as is used in Articles 36 of the Franco-British treaty of 1713: "*Les vaisseaux de guerre . . . pourront en toute liberté conduire où bon semblera les vaisseaux et leur marchandises qu'ils auront pris sur les Ennemies.*" The idea that prizes taken should be

[59] "The right of a belligerent to bring his prize to a neutral friend's harbour, and even to sell her there, appears to have been unquestioned before the eighteenth century, but it gave rise to difficulties. . . . In 1709 a claim made by a foreign power to adjudicate upon Englishman's prizes brought to its harbours was declared (by the High Court of Admiralty) to be unfounded and contrary to the law of nations." Law and Custom of the Sea (Naval Records Society, 1916, ed. Marsden), II, Introd. xii, xiv.

conducted by the belligerent war-ship into a neutral port is expressed in every treaty which contains a provision for the asylum of neutral prizes, so that the interpretation put upon the clause, first by Mr. Secretary Lansing, and afterwards by the Federal Court in the *Appam* case, is in complete accord not only with the historic expression of the principle, but also with the obligations of neutrality in modern international law.

A distinction must be drawn between the operation of changed circumstances upon a prior treaty, and the operation of a rule of law developed after the treaty was made. Changed circumstances may render the treaty inoperative, as stated by Wharton and Schmidt. A changed rule of law, on the other hand, may result in the limited operation of the treaty through construction. In the *Appam* case the second situation was presented. Asylum for prizes was a doctrine antedating the development of the modern law of neutral duties. Therefore, the provision in the treaty was to be strictly construed as in derogation of international law.

The Hague Convention, XIII of 1907, containing provisions relating to asylum for prizes, was ratified by the German Empire, with reservations as to Articles 11, 12, 13, and 20. The United States ratified it, with reservations as to Article 23 and as to the meaning of Article 3. Great Britain, making reservations as to Article 23, signed but never ratified the convention. Article 28 states that the provisions of the convention were not to apply except as to contracting Powers, "and then only if all the belligerents are parties to the convention." This would seem to dispose of the contention that the Hague Convention, as such, superseded the apparently conflicting provisions of the treaty with Prussia. Neither the United States nor Great Britain, as a matter of fact, made any such claim. It was only as a rule of international law, "now generally recognized and embodied" in Articles 21 and 22 of Convention XIII of 1907, that the British Government sought to have it applied to the *Appam* case. Because Article 23, having been adopted by a great majority of states, was alleged to be declaratory of international law, Germany appealed to the convention. Both Great Britain and Germany, therefore, held that in part Convention XIII was declaratory of international law. Articles 21 and 22 were ir-

reconcilable with Article 23. Mr. Lansing adopted the former, and properly, as the United States by the actions of its delegation at The Hague and of the Senate had rejected the latter. Judge Waddill, in giving judgment for the owners of the *Appam*, followed the interpretation of the Prussian treaty and of the status of the Hague Convention taken by the Department of State, and this position was followed by the Supreme Court in affirming the judgment of the court below.[60]

Such being the principal provisions of the treaty respecting neutral rights and duties, it is somewhat surprising that they were not more frequently invoked by the United States while a neutral. The general silence of the American Government with reference to the treaty is significant. In the *Frye* case it was the German Government which suggested that Article 13 of 1799 (renewed in 1828) might govern. Thereupon the Secretary of State declared that the destruction of the *Frye* was a "violation of the obligations imposed upon the Imperial German Government under existing treaty stipulations between the United States and Prussia." It was, therefore, by virtue of its treaty-rights that the United States made claim for indemnity. No objection that the German lists of contraband were in opposition to the contraband list of 1799 (renewed in 1828) seems to have been made, nor was the claim made that destruction of neutral vessels was opposed to the treaty. More important is the omission of any reference to treaty-rights in Mr. Bryan's protest against Germany's proclamation of a war-zone around the British Isles. In no part of the German declaration of February 4, 1915, was the word "blockade" used or any phrase in any way describing a blockade. In the *Appam* case Germany claimed asylum under her alleged treaty-rights. The position of the United States that asylum for prizes is in derogation of international law, that the treaty article should be construed strictly, and that strict construction required that prizes be brought in by war-vessels, recognized the validity of the article but denied its applicability to the *Appam* case.

Only in general terms and incidentally did the United States refer to the repeated breaches of the treaty by Germany. In the first *Lusi-*

[60] The Appam case was fully discussed in the October number of this JOURNAL, 1916, 809–831. *Cf.* pp. 816–817.

tania note, May 13, 1915, Mr. Bryan called attention to the "explicit stipulations of our treaty of 1828," but founded no argument thereon. Many reasons may be found to explain this policy of silence with reference to what were plainly a series of violations of the treaty. A general standard of neutral rights was preferable to any special standard to be applied as against Germany, first, because Austria was properly to be held by the same standard as was Germany; second, that the same measure of neutral rights should be asserted against Great Britain as against Germany; and, finally, as the strongest and most important of the neutral nations, the United States should not claim special privileges for herself under the treaty, but seek to establish rights equally applicable to all neutral nations upon the broader basis of humanity. The submarine policy of Germany at once transcended the whole sphere of mere commercial regulations in time of war which the articles of the treaty having to do with neutrality sought to govern.

VI

THE TREATY SINCE APRIL 6, 1917

The provisions of the treaty fall into four classes: first, those which have to do with commercial intercourse in time of peace; second, those having to do with neutrality; third, those providing for a situation in which Germany and the United States should be at war together against a common enemy; fourth, those to be called into activity when Germany and the United States found themselves at war with each other. Upon the outbreak of war, April 6, 1917, the purely commercial regulations having to do with the regime of peace were, like all commercial treaties of that nature, abrogated. Those of the third class may be left to one side as irrelevant. Those of the second and fourth classes must be considered together, because the provisions which had to do with neutrality had a direct bearing upon those to be called into action after war began.

At first sight, Articles 23 and 24 of the treaty of 1785 (the first renewed in part in 1828, the second wholly renewed) seem to be separable from the rest of the treaty, because Article 24 concludes thus:

And it is declared that neither the pretence that war dissolves all treaties nor any other whatever shall be considered as annulling this and the next preceding article; but, on the contrary, that the state of war as precisely that for which they are provided and during which they are to be as sacredly observed as the most acknowledged articles in the law of nature or nations.

There was such a persistent disregard of the articles of the treaty governing the rights of the United States as a neutral between August, 1914, and April, 1917, as to involve the whole treaty, because the same spirit underlies the whole. This position was seemingly recognized by Secretary Lansing, when, in answer to the proposal of the German Government, presented through the Minister of Switzerland, February 10, 1917, he stated that

this Government is seriously considering whether or not the Treaty of 1828 and the revived articles of the treaties of 1785 and 1799 have not been in effect abrogated by the German Government's flagrant violations of their provisions, for it would be manifestly unjust and inequitable to require one party to an agreement to observe its stipulations and to permit the other party to disregard them. It would appear that the mutuality of the undertaking has been destroyed by the conduct of the German authorities.

Anticipating that the severance of diplomatic relations between the United States and Germany might lead to war, the German Government proposed that Article 23 of 1799 (renewed in 1828) should be reaffirmed. "This article," the German Foreign Office stated, "which is without question in full force as regards the relations between the German Empire and the United States, requires certain explanations and additions on account of the development of international law." Then was submitted the text of a special arrangement concerning the treatment of German and American nationals and their property in each other's territory after the severance of diplomatic relations. Germany proposed that German merchants in the United States and American merchants in Germany should be put on a par with the other persons mentioned in Article 23, namely, "all women and children, scholars of every faculty, cultivators of the earth, artisans, manufacturers, and fishermen, unarmed and inhabiting unfortified towns, villages, or places, and in general all others whose occupations are for the common subsistence and benefit of mankind." Germans in the

United States and Americans in Germany, it was proposed, should be free to leave the country of their residence, taking with them their personal property, including money, valuables, and bank accounts, within times and by routes to be specified. Resident enemy aliens were to be protected in person and property, without restrictions as to private rights, upon a plane of equality with resident neutral aliens. Patent rights were not to be void, or their exercise impeded; contracts between Germans and Americans were not to be canceled, avoided, or suspended, except as such action might be had with reference to neutrals. A specific recognition of the Sixth Hague Convention with reference to the treatment of enemy merchant ships at the outbreak of hostilities was also requested.

This plan had been suggested to Ambassador Gerard before he left Berlin, and his unwillingness to acquiesce in it gave rise to embarrassment and serious interference with his ambassadorial rights and functions. In declining to consider the proposition of the German Government, forwarded through the Swiss Minister, Mr. Lansing rehearsed the repeated and gross violations of the treaties while the United States was a neutral, and called attention to the fact that since the severance of relations between the two countries, American citizens had been prevented from removing freely from Germany. "While this is not a violation of the terms of the treaties mentioned," wrote Secretary Lansing, "it is a disregard of the reciprocal liberty of intercourse between the two countries in time of peace, and cannot be taken otherwise than as an indication of a purpose on the part of the German Government to disregard in the event of war the similar liberty of action provided for in Article 23 of the Treaty of 1799 — the very article which it is now proposed to interpret and supplement almost wholly in the interest of the large number of German subjects residing in the United States and enjoying in their persons or property the protection of the United States Government."

Franklin's favorite article, looking toward the humane treatment of prisoners of war, was not referred to in the German proposition. As yet but few opportunities have been offered for the purpose of testing this provision. In no sense, if we may believe the reports made upon the treatment of Allied prisoners in German prison camps, has the

spirit of Franklin's article been maintained toward the unfortunate French, British, and Russian prisoners of war; and there is no reason to believe from the reports which have been made of the treatment of the few Americans already in German camps that a new standard would be set up for Americans.

To the extent that Articles 23 and 24 are declaratory of international law, no one suggests that their provisions will be departed from by the United States, unless by way of reprisal. Nevertheless, the treaty as a whole is at an end. Conceived in the spirit of eighteenth-century enlightenment, phrased by Franklin and Adams "according to the laws of Nature and of Nature's God," the Prussian treaties have been diametrically opposed to the doctrines of an infallible State which justifies its policy under the guise of necessity. When the German armies invaded Belgium, they did so at the behest of a government which claimed that state policy was supreme over treaty faith. Until that policy is overthrown, treaties with such a state cannot exist. The statement of Kohler that "an international law based upon international treaties can no longer be," is a statement of Prussian policy against which the United States and the Allies are fighting: for the vindication of the doctrine that international society based upon international law and international treaties is the only international society worthy of the name. The general principles of Franklin's treaty have, in the main, remained unchanged. It is Germany that has changed. The treaty has fallen to the ground because of the Prussian doctrine that not even the most sacred treaties may stand in the way of the policy of the Prussian State.

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